THE HISTORICAL INTERPRETATION OF

UNABRIDGED FREEDOM OF SPEECH,

BY

THEODORE SCHROEDER.

A chapter from "Obscene Literature and Constitutional Law."

Republished from Central Law Journal, March, 1910.

FOR

FREE-SPEECH LEAGUE,

120 LEXINGTON AVE.

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SECOND EDITION.

Sir Leslie Stephens on Toleration.

"The doctrine of toleration requires a positive as well as a negative statement. It is not only wrong to burn a man on acccunt of his creed, but it is right to encourage the open avowal and defence of every opinion sincerely maintained. Every man who says frankly and fully what he thinks is so far doing a public service. We should be grateful to him for attacking most unsparingly our most cherished opinions.****

"Toleration, in fact, as I have understood it, is a necessary corelative to a respect for truthfulness. So far as we can lay it down as an absolute principle that every man should be thoroughly trustworthy and therefore truthful, we are bound to respect every manifestation of truthfulness.****A man must not be punished for openly avowing any principles whatever.****

"Toleration implies that a man is to be allowed to profess and maintain any principles that he pleases; not that he should be allowed in all cases to act upon his principles, especially to act upon them to the injury of others. No limitation whatever need be put upon this principle in the case supposed. I, for one, am fully prepared to listen to any arguments for the propriety of theft or murder, or if it be possible of immorality in the abstract. No doctrine, however well established, should be protected from discussion. The reasons have been already assigned. If, as a matter of fact, any appreciable number of persons is so inclined to advocate murder on principle, I should wish them to state their opinions openly and fearlessly, because I should think that the shortest way of exploding the principle and of ascertaining the true causes of such a perversion of moral sentiment. Such a state of things implies the existence of evils which cannot be really cured till their cause is known, and the shortest way to discover the cause is to give a hearing to the alleged reasons." From "The Suppression of Poisonous Opinions" in *The Nineteenth Century*, March and April, 1883.

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THE HISTORICAL INTERPRETATION OF "FREEDOM OF SPEECH AND OF THE PRESS."

The purpose is to re-interpret our constitutional guarantee for an unabridged freedom of speech and of the press, by the historical or scientific method, and with special reference to the specific issue raised by the judicial dogmatism thereon and my different conception of how that phrase ought to be interpreted. To clarify the issues, I restate these contradictory propositions, so the reader may have them constantly in mind during the following discussion.

My contention as to the meaning of a constitutionally guaranteed *right* to *unabridged* freedom of speech and of the press, is this: No matter upon what subject, nor how injurious to the public welfare any particular idea thereon may be deemed to be, the constitutional right is violated whenever anyone is not legally free to express any such or other sentiments, either;

First, because prevented in advance by a legally created censorship, or monopoly in the use of the press, or by other governmental power, or;

Second, because in the effort to secure publicity for any idea whatever, the equality of natural opportunity is destroyed, in that some, by subsequent legal penalties or other legal limitations, are deterred, or are impeded, in the use of the ordinary and natural methods of reaching the public, on the same legal terms, as these are permitted to any person for the presentation of any other idea, or;

Third, because the natural opportunity of all is abridged by some statutory impediment, such as taxes upon the dissemination of information placed upon all intellectual intercourse, as such, or on all of a particular class, or;

Fourth, because inequalities in State-created, or State-supported, opportunity is legalized, so that, in the effort to secure publicity for any sentiments and merely because of their

nature, literary style, or supposed evil tendency, any one is discriminated against, either by law, or for any cause by any arbitrary exercise of official discretion, in the use of such State-created or State-supported facilities, or;

Fifth, because after expressing one's sentiments one is by law liable to punishment, merely for having uttered disapproved thoughts;

Provided always, that the prohibition, abridgment, discrimination, subsequent punishment, or other legal disability or disadvantage, is arbitrarily inflicted, or attaches merely because of the character, literary style, or supposed bad tendency of the offending sentiments, and their spread among sane adults, willing to read, see, or hear them, or is the result of arbitrary official discretion, and that they do not attach because of any inseparably accompanying, or other resultant penalized invasive act, constituting an actually ascertained, resultant, material injury, (as distinguished from mere speculative or constructive harm) inflicted, or by overt act attempted to be inflicted, before arrest and punishment, and in either case actually resulting from the particular utterance involved.

But, if the injury is to reputation, or loss of public esteem, and among the consequences is material injury to the libeled person, even then, truth and justifiable motive must always be recognized by law as a complete defense; and where the resultant injury consists in violence to person or property, *actually* attempted or achieved, then the *intent* to achieve such results must be of the essence of the crime, and punishment of a *mere* speaker must be only that of an accessory before the fact, if our constitutional guaranty is to be made effective. I do not discuss civil remedies.

THE JUDICIAL INTERPRETATION.

The contrary conclusion of the Courts is well summarized by a dictum, perhaps hastily uttered, of the Federal Supreme Court. These are its words: "The main purpose of such constitutional provisions is to prevent all such *previous* restraints as had been practised by other governments, and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare"![1]

In England the licensing acts, which put a *previous* restraint upon publications, existed for only a short time, and finally expired in A. D. 1694.[2] It seems, therefore, according to the

[1]Patterson v. Colo., 205 U. S. 454, (462).

[2]Stevens' "Sources of the Constitution of the U. S.," p. 221; Patterson's "Liberty of Press and Speech," 50 and 51.